

¹ Letter from William L. Phalen to Brenden Webb (Sept. 7, 2004).

After hearing testimony, examining exhibits, hearing arguments of counsel, the Court makes the following findings:

Conservative treatment by Dr. Edward J. Protic or any doctor in his area recommended by Dr. Protic [sic].²

On appeal to the Board, respondent raises the following issues:

1. Whether Special Administrative Law Judge Applng exceeded his jurisdiction ruling that claimant suffered an injury that arose out of and in the course of his employment.
2. Whether Special Administrative Law Judge Applng exceeded his jurisdiction ruling that claimant gave oral notice of his alleged injury.
3. Whether Special Administrative Law Judge Applng exceeded his jurisdiction ruling that claimant gave sufficient written notice of his alleged injury.³

But respondent did not raise these issues at the December 15, 2004 preliminary hearing before the SALJ when the parties were asked to state the issues,

The Court: We are here today on?

Mr. Phalen: Medical treatment, requesting medical treatment.

The Court: That's the only issue is medical treatment?

Mr. Phalen: Today, yes.

The Court: Okay.⁴

Claimant objects to respondent raising new issues for the first time on appeal.

The [c]laimant would first point out to the Board that the [r]espondent is raising these three issues for the first time on appeal. More specifically, the only issue raised by the parties at the [p]reliminary [h]earing was the [c]laimant's need for medical treatment. The [r]espondent formally raised no other issue at the

² Order (Dec. 20, 2004).

³ Application for Review of Award at 1 and 2 (filed Jan. 3, 2005).

⁴ P.H. Trans. at 4.

[p]reliminary [h]earing. The issues formally raised by the parties can be found at the beginning of the [p]reliminary [h]earing [t]ranscript on page 4. . . .⁵

Therefore, before reaching the issues listed by respondent in its Application for Review and its brief, the Board must first decide if it has jurisdiction to review the preliminary order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

The issue decided by Judge Appling is not subject to review from a preliminary hearing order. Accordingly, this appeal should be dismissed.

This is an appeal from a preliminary hearing order. Consequently, not every alleged error is subject to review. The Board can review preliminary hearing orders in which an ALJ has exceeded his or her jurisdiction.⁶ Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and
- (4) do certain other defenses apply.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.⁷

Respondent attempts to raise the jurisdictional issues of:

- (1) Whether Special Administrative Law Judge Appling exceeded his jurisdiction ruling that [c]laimant suffered an injury that arose out of and in the course of his employment.

⁵ Appeals Brief of Claimant (filed Feb. 17, 2005).

⁶ K.S.A. 44-551(b)(2)(A).

⁷ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

(2) Whether Special Administrative Law Judge Appling exceeded his jurisdiction ruling that [c]laimant gave timely oral notice of his alleged injury.

(3) Whether Special Administrative Law Judge Appling exceeded his jurisdiction ruling that [c]laimant gave timely written notice of his alleged injury.⁸

The issues of whether a worker needs ongoing medical treatment and whether he is entitled to a change of treating physician are not jurisdictional issues listed in K.S.A. 44-534a that are subject to review from a preliminary hearing order. Those issues do, however, comprise questions of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁹

The SALJ did not exceed his jurisdiction by ordering respondent to provide medical treatment and appointing a doctor to treat claimant. At a preliminary hearing, an ALJ has the authority to determine whether an injured worker is in need of additional medical treatment and/or is entitled to a change of physician. The issues that respondent now raises concerning whether claimant suffered an injury that arose out of and in the course of his employment, notice and written claim, were not addressed by the SALJ because they were not raised at the hearing. These issues cannot be raised for the first time on appeal.

WHEREFORE, the Appeals Board dismisses this appeal.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and Sentry Insurance Company
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁸ Respondent's Memorandum in Support of Application for Review of Preliminary Award by The Workers' Compensation Appeals Board at 2 (filed Jan. 25, 2005).

⁹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).